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September 15, 2006

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552

Attention: No. 2006-24; Subordinated Debt Securities and Mandatorily Redeemable Preferred Stock; 71 Federal Register 37862; July 3, 2006.

Ladies and Gentlemen:

The American Bankers Association ("ABA")¹ is writing in support of recent proposed changes by the Office of Thrift Supervision ("OTS") to its rule governing inclusion of subordinated debt securities and mandatorily redeemable preferred stock in tier 2 capital. The OTS currently requires that a savings association obtain OTS approval (or non-objection) before it may include such items in tier 2 capital. The applicable OTS regulation, codified at 12 CFR 563.81, applies strict application and notice procedures that a savings association must meet in order for these securities to be included in supplementary capital and establishes the conditions required for OTS approval of such securities. The OTS now proposes to reduce the regulatory burden on savings associations seeking to include subordinated debt securities and mandatorily redeemable preferred stock in their capital. The ABA believes these changes are appropriate.

Specific Comments

Proposed Changes to Notice and Application Procedures

The OTS proposes a number of changes to the notice and application procedures, primarily to conform them to the general notice and application procedures that the OTS revised since 12 CFR 563.81 was adopted. The new regulation will eliminate duplication and inconsistencies with the general procedures by cross-referencing those procedures. ABA believes it is helpful to use consistent procedures for all notices and applications where possible. We therefore support these proposed changes.

¹ The ABA, on behalf of the more than two million men and women who work in the nation's banks and savings associations, brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership--which includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks--makes ABA the largest banking trade association in the country.

In addition, the OTS makes clear that a savings association may use the revised procedures even after it has issued the securities, but the savings association may not include the securities in its capital until it has followed the procedures and received OTS approval. ABA believes that this clarification is very valuable and strongly supports the proposal.

Securities Requirements

The proposed rule requires that a savings association issuing these securities must provide certain disclosures to purchasers and the securities must contain certain restrictions on repayment and other terms in order to qualify for capital inclusion. The OTS proposes to eliminate the following three existing provisions from the regulation:

- The restrictions, imposed originally by the Federal Home Loan Bank Board, that would prohibit a purchaser of covered securities from selling them to another savings association or affiliate without the prior approval of the OTS;
- The requirement that all certificates evidencing subordinated debt state that the savings association has the right to prepay the debt in the first 15 months from issuance; and
- The requirement for certain provisions that must be worded exactly as provided in the regulation.

These changes would conform the OTS rules to those of the other bank regulators and would provide greater flexibility to savings associations in structuring these securities. Accordingly, ABA supports these proposed changes.

Maturity Requirements

Under the existing OTS rule, a covered security must have an original period to maturity (or to required redemption) of at least seven years. In addition, OTS's rule prescribes a formula that limits the amount of required sinking fund payments, required prepayments, required purchase-fund payments, required reserve allocations, and required redemptions that may occur during the first six years that a covered security is outstanding. The OTS's sister banking agencies have no such requirements, and in fact only require a five-year maturity. OTS proposes to change its rule by conforming to the approach taken by the other agencies. As a result, covered securities will be required to have an original weighted average maturity (or period to required redemption) of at least five years. ABA supports conforming the OTS provisions to the less restrictive requirements of the other banking regulators.

Mandatory Prepayment of Principal

The proposed rule states that subordinated debt securities may not provide events of default or contain other provisions that could result in a mandatory prepayment of principal, other than events of default that related to bankruptcy, insolvency, receivership, and similar events. This is consistent with the requirements of other banking regulators, and ABA supports the proposal.

Indenture Requirements

OTS proposes to update the monetary thresholds in the indenture requirements to reflect statutory changes in the Trust Indenture Act of 1939. ABA supports the proposed changes. In addition, the OTS notes that it has issued case-by-case waivers of the indenture requirements when the securities are sold only to accredited investors. OTS asks whether it should exempt offerings to accredited investors that are holding companies of the issuer (or their subsidiaries) from the indenture requirement, and whether it should also exempt offerings to unaffiliated accredited investors. ABA recommends that the OTS provide both exemptions. Accredited investors are, by definition,

presumed to be sophisticated investors that do not need protections that otherwise may be appropriate.

OTS Review

The OTS proposes to rewrite the standards of review to eliminate obsolete and unnecessary requirements. In their place, the OTS will review a notice of a proposed issuance of new securities to determine, among other things, whether the issuance complies with applicable securities laws and an association's bylaws, whether the issuing association is adequately capitalized under Prompt Corrective Action standards, and whether the association will be able to service the securities. The ABA believes that the proposed standards are appropriate. Accordingly, the ABA supports these revisions.

Amendments

The proposed rule requires OTS approval or nonobjection for all amendments to the terms of the securities that would be made after OTS review. OTS eliminates the lesser standard of review of amendments only if they contradict OTS requirements or increase the risk to the insurance fund. ABA does not oppose these changes.

Other Changes

The OTS also restates several provisions in clearer language without substantive change and eliminates certain other obsolete provisions. ABA supports these clarifications.

Conclusion

The ABA commends the OTS for its thorough review of the provisions relating to inclusion of subordinated debt securities or mandatorily redeemable preferred stock in tier 2 capital. The proposed revisions would make the rules clearer, more consistent with other bank regulators' provisions, and less burdensome. For these reasons, the ABA supports the proposal. If there are any questions about these comments, please call the undersigned at 202-663-5331.

Sincerely,

A handwritten signature in black ink that reads "Paul Alan Smith". The signature is written in a cursive, flowing style.

Paul Smith
Senior Counsel